SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 425

SCHIEFFELIN & CO. & BEITZELL & CO., INC., *Petitioners,*

v.

THE UNITED STATES, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

BRIEF AMICUS CURIAE ON BEHALF OF HER MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

ANSEL F. LUXFORD *
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

ABRAM CHAYES
1 State Street
Boston, Massachusetts 02109

Attorneys for Her Majesty's Government

Of Counsel:

MORGAN, LEWIS & BOCKIUS
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

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INTRODUCTION

Her Majesty's Government in the United Kingdom of Great Britain and Northern Ireland respectfully submits this brief as amicus curiae in support of the petition of Schieffelin & Co. *et al.*, (hereinafter the Petition) that a writ of certiorari issue to review the

judgment of the United States Court of Customs and Patent Appeals entered in Customs Appeal No. 5339, 57 C.C.P.A. (Cust.) , 424 F.2d 1396 (1970).[1]

I

THE NATURE OF THE INTEREST OF HER MAJESTY'S GOVERNMENT

This case concerns the substantive content of treaty commitments between the United States and the United Kingdom and has a direct bearing on the General Agreement on Tariffs and Trade[2] to which both nations are parties signatory. Specifically, it is the position of Her Majesty's Government that under Article 2 of the Convention to Regulate Commerce between the United States and the United Kingdom, July 3, 1815, 8 Stat., 228, T.S. No. 110 (hereinafter the British Treaty), the products of the United Kingdom coming into the United States are to be accorded most-favored-nation treatment on taxes levied against them,[3] which provision entitles the United Kingdom to the benefits of the Treaty of Friendship, Commerce and Navigation between the United States and the

[1] This brief is filed with the written consent of all of the parties, pursuant to Rule 42 of the Rules of this Court.

[2] Original form, 61 Stat. (5) A3-A90. Current Form: Basic Instruments and Selected Documents Vol. IV. Republished: Department of State Publication No. 8468 (hereinafter referred to as GATT and cited as BISD Vol. IV).

[3] *See* Petition at 3. Although the language of the most-favored-nation clause in the 1815 British Treaty is couched in the archaic form of "duties", Article 2 has been construed to encompass excise taxes imposed on imported products. *See United States* v. *Domestic Fuel Corp.*, 21 C.C.P.A. (Cust.) 600 (1934). That construction is not at issue in this case.

Republic of Ireland, January 21, 1950, 4 U.S.T. 788, T.I.A.S. No. 2322 (hereinafter the Irish Treaty).[4] The rights of the Republic of Ireland and the United Kingdom under such treaties are at issue in this case.

II

STATEMENT OF THE CASE

This is a case of treaty interpretation. It involves the amount of taxes payable on imported whisky and it arises in the customs courts. But the minutiae of tax and customs law are not controlling features in this case. At issue is the application of Article XVI of the Irish Treaty which, in common with many other United States' commercial treaties, secures to those imports "national * * * treatment in all matters affecting internal taxation * * *". More precisely, Her Majesty's Government contends that the federal tax on a gallon of whisky imported in bottles at the usual proof (86 proof) is $10.50, while the tax borne by the same amount of domestic whisky at the same proof is only $9.03. This differential occurs despite the provisions of the Irish Treaty guaranteeing imports protection from discriminatory taxes.

The Internal Revenue Code of 1954 (IRC), Sec. 5001(a)(1), provides for a federal excise tax on whisky and other distilled spirits—whether produced in the United States or produced abroad and imported into the United States—of $10.50 per gallon. This sounds fair and simple: domestic products and imports alike bear the same $10.50 per gallon rate of tax. But as applied, this law results in the discrimination de-

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[4] *See* Petition at 3.

[5] *See* Appendix A, *infra*, at p. 1a.

scribed above: *bottled imports* of whisky are taxed $1.47 per gallon more on the average than the same gallon of domestic whisky in the form consumed by the public.[6]

This results because under IRC § 5001 not all "gallons" are the same for tax purposes. Under that section the $10.50 per gallon tax is levied "on each proof gallon, or wine gallon when below proof." Translated this means that "under proof" spirits (less than 50% alcohol by volume) are taxed on the basis of *volume* (hereinafter the "wine gallon" basis). Spirits at proof (50% alcohol, *i.e.*, 100 proof) and "over proof" are taxed on the basis of their *alcoholic content* (hereinafter the "proof gallon" basis, *i.e.*, in terms of their equivalent volume of 100 proof whisky).[7] Thus, any spirits that are subject to tax at a point in time when they are under proof pay the full $10.50 excise tax as though they were at 100 proof.

For domestic whisky the tax is determined upon withdrawal from bond, the Government-supervised warehouses where whisky is aged or stored. IRC § 5006. Since all domestic whisky is at or above 100 proof when withdrawn from bond, the tax is determined on the basis of its alcoholic content (proof gallon).

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[6] As noted in footnote 9 of the opinion of the court below, the tax classification of spirits was established by the Congress in 1868 for purely domestic purposes and has been retained in substance each time the Congress has considered the subject. Her Majesty's Government does not contend that the Congress in first enacting this tax provision did so with a view to discriminating against bottled imports of spirits. Rather the claim is that it now has that effect and serves that purpose.

[7] The "proof" of a distilled spirit is equivalent to twice the percentage of its alcoholic content.

When water is added to bring the whisky to the customary 86 proof at which it is sold to the consumer the effective tax is proportionately reduced to $9.03 per gallon.

For imported whisky the tax is determined at the time of entry into the United States. Since bottled Irish and Scotch whisky comes into the United States ready for consumption at 86 proof there is no way an importer can avoid paying the $10.50 wine gallon rate, $1.47 per gallon in excess of the tax on the domestic product with which it competes.[8]

This is the discrimination in tax burden that is under attack in this case. Petitioners imported both Scotch whisky and Irish whisky, bottled at 86 proof. The imports were assessed with the excise tax at the $10.50 per gallon rate as though 100 proof—or $1.47 per gallon more than the tax paid on an equivalent volume of 86 proof bottled domestic spirits. Petitioners paid the tax under protest claiming that the tax treatment was less favorable than that accorded the like domestic product, in violation of the Irish Treaty.

The Court of Customs and Patent Appeals relying on *Borcal-Vandervoort & Co. v. United States*,[9] construing similar provisions in the General Agreement

[8] Bulk Scotch whisky imported in barrels at 100 proof or more avoids the burden of the extra tax but such whisky does not command the premium price or prestige of Scotch imported in bottles. Moreover, the absence of tax discrimination in the case of bulk imports does not excuse such discrimination in the case of bottled imports.

[9] 46 C.C.P.A. (Cust.) 28 (1958), *cert. denied*, 359 U.S. 953 (1959).

on Tariffs and Trade[10] held that the additional tax borne by the import did not violate the Irish Treaty.

Petitioners below sought to distinguish *Bercut*, a position with which the amicus curiae associated itself.[11] Her Majesty's Government went further, however, and attacked the holding of the Customs Court in *Bercut* as incorrect. Since the court below rejected these views, it follows that review and reversal in this Court is the only way to correct an erroneous precedent on a fundamental question of the law of international commerce.

III

QUESTION PRESENTED

Whether the United States' excise tax on distilled spirits, applied so that *in fact* whisky imported in bottles at the usual proof (86 proof) must pay $1.47 more tax per gallon than that borne by domestic whisky of the same proof, is consistent with a treaty obligating the United States to accord "national * * * treatment in all matters affecting internal taxation" where the treaty defines "national treatment" as "treatment * * * no less favorable than the treatment accorded * * *, in like situations, to * * * products * * * of [the United States]". The Irish Treaty, Arts. XVI, XXI.

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[10] Art II, 61 Stat. (5) A15, BISD Vol. IV; Art. III, 62 Stat. (3) 3680, BISD Vol. IV.

[11] The opinion of the Court of Customs and Patent Appeals notes that "Amicus 'accepts the premise of the Customs' Court that *Bercut* "is not distinguished [from the present case] * * * *"." C.C.P.A. Op. at 424 F.2d 1396, 1401, *quoting* Brief for Amicus, Her Majesty's Government at 6, *Schieffelin v. United States*, *supra* (C.C.P.A.). The court apparently overlooked the prefatory phrase to the quoted excerpt which reads: "for the sake of its main argument in this brief * * *." The statement was not intended to take the position that the two cases are indistinguishable.

IV

REASONS FOR GRANTING CERTIORARI

A. The Court of Customs and Patent Appeals, in Construing the National Treatment Clause in the Irish Treaty Has Decided a Federal Question of Substance Not Heretofore Determined by This Court

National treatment clauses have been traditionally utilized to ensure that, apart from regularly established tariffs, international trade is carried on without discrimination against imports. This mutual commitment is as important in securing equality for United States' exports in the foreign market place as it is for foreign exports seeking equality here.[12] It has been a central element in American commercial policy for almost a half century.[13]

After World War II the United States took the lead in sponsoring a liberal, open and non-discriminatory multilateral system of world trade. A cornerstone of this system is "national treatment", embodied in GATT, to the end that tariff concessions would not be undermined by discriminatory taxes and other non-tariff measures providing "protection" to domestic products.[14] Today 77 countries, including the United

[12] The relevance of the national treatment concept is by no means confined to trade in goods. In the Irish Treaty, the obligation of national treatment is imposed with respect to some eighteen different kinds of activity, including the acquisition and the leasing of land (Article VII); the formation of commercial, scientific and philanthropic companies; and obtaining and maintaining patents of invention and rights in trademarks and trade names (Article VI).

[13] *See* letter from Secretary of State Hughes to Senate Foreign Relations Committee, Foreign Relations of the United States, Department of State, 1924, Vol. II, at 183.

[14] *See* 14 Whiteman, *Digest of International Law* 606, Dept. of State Publication. Vol. 14 to be published about Sept. 1970 (hereinafter cited "14 *Digest of International Law*"). The "national treatment" concept is contained in Arts. II and III of GATT. *See* note 10, *supra*.

States and the United Kingdom, are parties to GATT, and are mutually bound by this pivotal obligation of national treatment.

In the last two decades, the United States has pursued an active program of modernizing its bilateral commercial treaties. The Irish Treaty here involved was concluded in 1950 and was one of the early treaties of this series, all of which were modeled on the concepts of GATT and gave prominence to the national treatment concept. To date the United States has entered into some twenty or more such treaties (listed in Appendix A). To this must be added the scores of other treaties that, while not having "national treatment" provisions, do have "most-favored-nation provisions" that entitle the parties to national treatment rights conferred in other treaties.[15]

Although the content of the national treatment provision has been the subject of heated controversy, not only in the courts[16] but also in the Congress[17] and in the international forum of GATT,[18] this Court has not construed the modern national treatment clause. The decision in this case bears directly on the meaning

[15] Her Majesty's Government's claim in this case arises out of the "most-favored-nation" provision in the British Treaty.

[16] *See* pp. 11-14, *infra*.

[17] The "national treatment" concept and its application to the taxation of imported whisky was the subject of proposed remedial legislation in both the 81st and 82d Congresses. *See* pp. 15, 16, *infra*.

[18] Both the scope of the national treatment clause proposed for inclusion in GATT and its subsequent application to specific items and practices have been the subject of much debate. *See, e.g.*, U.N. DOC EPCT/TAC/PV. 10 at 13-15 (1947); U.N. DOC EPCT/TAC/PV. 10 at 3 (1947); Jackson, *World Trade and the Law of GATT*, ch. 12, §§ 12.2, 12.3 (1970); pp. 19-21, *infra*.

that will be given to the national treatment provisions in all these treaties by United States' courts. The guidance of this Court is required in the present state of the law.[19]

The question presented is not one of merely theoretical or diplomatic interest. In the case at bar alone, it affects the tax treatment of the largest export in terms of dollar volume from the United Kingdom to the United States. Scotch whisky exports from the United Kingdom to the United States were valued at over $263,000,000 in 1969, and amount to more than 12% of the total United Kingdom exports to the United States.[20]

[19] Evidence of the significance of this case in this field is illustrated by the fact that 14 *Digest of International Law* has a topic heading "Discriminatory internal taxes" (p. 813) followed by the topic heading "Method of assessment of taxes as a nontariff barrier" (p. 814), both under a major heading "*Nontariff Trade Barriers*" (p. 782). The only illustration discussed under the "Method of assessment of taxes as a nontariff barrier" is the United States wine gallon method of taxing distilled spirits, citing and quoting from the customs courts' decisions on this issue including *Schieffelin*. There is no other judicial guidance. But *cf. Parrott*, *infra*, at pp. 18-19.

[20] The United States and the United Kingdom historically have been major trading partners. United Kingdom exports to the United States amount to approximately 2 billion dollars a year; United States exports to the United Kingdom in 1968 amounted to approximately 2.3 billion dollars (Department of Commerce, Bureau of Census, *Highlights of U.S. Export & Import Trade*, Dec. 1969; U.S. Imports, Table I-8; U.S. Exports, Table E-6). In 1969 United States' imports of Scotch whisky totaled over 44,000,000 gallons. These detailed statistics and those which follow are derived from the U.S. Department of Commerce, Bureau of Census Statistics for the Year 1969 (Code heading IM 146 Schedule 1, Part 12).

For the year 1969 alone the excess tax payable on bottled Scotch imports by virtue of the wine gallon method of assessment amounted to over $45,000,000. Moreover, the tax discrimination against under proof bottled Scotch places heavy economic pressure on the United States importer to import Scotch in bulk, at or above proof. The export value of 86 proof bottled Scotch whisky to the United Kingdom is $7.45 per wine gallon; the export value of bulk Scotch whisky at 100 proof or above is only $2.50 per *proof* gallon (equal to $2.15 per gallon at 86 proof). The United Kingdom thus was deprived of over $80,000,000 in dollar earnings in 1969 because of the effect of the wine gallon method of taxation in diverting exports of Scotch whisky from bottled to bulk form.[a]

In *Bercut*, the court said that the importer could avoid the discriminatory impact of the tax by importing in bulk. But this expedient does not help the United Kingdom, the contracting party to which the obligations of the treaties run.

The implications of this case are broader still. The "Kennedy Round" of tariff negotiations under GATT, terminating in 1967, is reducing the level of national tariffs to a point where tariff barriers will cease in most cases to be an important impediment to expanding world trade among developed countries. The principal remaining obstacles are the so-called "non-tariff"

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[a] 13,075,449 proof gallons of spirits were exported to the United States in bulk form in 1969 at an export price of $2.50 per proof gallon, yielding to the United Kingdom an export value of $32,688,623. If shipped in bottles at 86 proof, the volume would have been 15,204,010 gallons with an export price of $7.45 per wine gallon yielding to the United Kingdom an export value of $113,269,875. The total loss of dollar earnings is the difference between $113,269,875 and $32,688,623 or $80,581,252.

barriers against certain of which the national treatment clause is designed to serve as a safeguard.

It is no secret that every country harbors its little covey of non-tariff barriers and its group of industries that nestle under this protection. The United States properly demands that other countries eliminate their non-tariff barriers as serious obstacles to expanding international trade, even where there is no present treaty commitment requiring such action. But as long as it maintains its own discriminations, like the one here involved *which is covered by existing treaty obligations*, doubt must remain about the sincerity of the United States in its efforts to eliminate non-tariff barriers. That doubt, on an issue of this magnitude, can only be resolved by a decision of this Court.

B. Bercut Was Wrongly Decided and Previous Failures To Grant Certiorari Should Not Be Dispositive of the Present Petition

The amicus brief filed with the Court of Customs and Patent Appeals argued that the holding in *Bercut* was wrong. Nevertheless the court below reaffirmed that case and treated it as a controlling precedent. The holding in *Bercut* should therefore be reviewed by this Court.[23]

[22] *See generally*, Wilson, *Non-Tariff Barriers to International Trade: A Survey of Current Problems*, 18 J. Pub. L. 403 (1969).

[23] *Bercut* involved the question of whether the wine gallon method of taxing bottled imports of distilled spirits was contrary to the national treatment provisions of GATT. In the present case it is uncontested that the national treatment provisions of GATT are the equivalent of those in the Irish Treaty. To that extent *Bercut* and this case raise the same basic legal issue.

The Court declined to grant certiorari in both *Berent*, 359 U.S. 953 (1959), and a subsequent case, *China Liquor Distrib. Co. v. United States*, 52 C.C.P.A. (Cust.) 1, 343 F.2d 1005 (1964), *cert. denied*, 380 U.S. 962 (1965), raising a corollary issue but decided on the basis of *Berent*. These prior actions should not be dispositive of the instant Petition.[7] *Berent* was the first major interpretation of GATT by the Court of Customs and Patent Appeals, but the court did not have adequate materials available for the resolution of the complex and novel issue involved. For example, the Government brief twice quoted some of the applicable provisions of GATT. But both times it omitted the passages that clearly spelled out the purpose of the provision that the court was interpreting: "* * * internal taxes * * * should not be applied * * * so as to afford protection to domestic production", 62 Stat. (3) 3680, BISD Vol. IV, at 6. The whole discussion of GATT in the *Argument* portion of the Government brief consisted of little more than two pages, of which one page was quotations from the Agreement.

Moreover, the original GATT source documentation consists of thousands of pages of official and published documents. There is a similar quantity of

[7] As will be noted later, *Berent* has never been squarely challenged in any subsequent Court of Customs and Patent Appeals' case, probably because a challenger would be faced with the fact that even if *Berent* were wrong in its construction of the national treatment provisions of GATT, the importer could not win. A Protocol to GATT provided that relevant portions of the Agreement would not apply to existing legislation. 61 Stat. (6) A2054, BISD Vol. IV, at 77-78. The wine gallon provision of the Internal Revenue Code was within the class of exempt legislation. There is no comparable "grandfather" clause in the Irish Treaty and that is one reason why Petitioners here invoke the Irish Treaty rather than GATT. *See* pp. 17, 18, *infra*.

material in the hearings before the Congressional Committees dealing with United States' participation in GATT and the International Trade Organization (ITO).[25] These sources were not indexed, or were inadequately indexed, when *Bercut* was before the court in 1958, and even today the situation is far from ideal. Only recently, some twenty years after the event, have some solid reference works emerged. *See, e.g.*: Dam, *The GATT—Law and International Economic Organization* (1970); Jackson, *World Trade and the Law of GATT* (1970); 11 Whiteman, *Digest of International Law*, Dept. of State Publication, to be published about Sept. 1970. It is not even clear whether the court below had access to these reference works at the time it considered its decision in the instant case. In any case it did not cite them in its opinion.

In *China Liquor Distrib. Co.* v. *United States*, *supra*, the court followed *Bercut* without re-examining its basis. Appellants' brief before the Court of Customs and Patent Appeals in *China Liquor* assumed *Bercut* as controlling and sought to distinguish it.[26] Similarly,

[25] *See* Part 2 (Exhibits) Hearings before the Committee on Finance, United States Senate, 80th Congress, 1st Session, on Trade Agreements System and Proposed International Trade Organization (ITO) Charter ("Part II—1947 Senate Hearings")—which fully documents the pre-eminent rôle the United States played in developing both ITO and GATT. (*Cf., e.g.*, p. 885 of Part II.) *See* also, Department of State Memorandum for the President of April 27, 1949, on ITO included in Hearings before the Committee on Foreign Affairs, House of Representatives, 81st Congress, 2nd Session, on H.J. Res. 236 (participation in ITO) 3, 4 (hereinafter the "1950 House Hearings on ITO").

[26] Brief for Appellants at 51, *China Liquor Distrib. Co.* v. *United States*, *supra*. So, too, the Government's brief relied on *Bercut* but did not address itself to its underpinnings. *See* Brief for Appellee at 14, *China Liquor Distrib. Co.* v. *United States*, *supra*.

the Petition for Certiorari failed to challenge *Bercut* on the merits, averring only that it was distinguishable.

An analysis of the material not before the court in *Bercut* inescapably leads to the conclusion that the Court of Customs and Patent Appeals misconstrued the national treatment provisions of GATT and has extended this misconstruction to the Irish Treaty in the instant case.

Although the merits of the holding in *Bercut* cannot properly be argued in detail at this stage of the proceedings, the weakness of that case can be illustrated by other means. *Bercut* has on several occasions been the subject of critical scholarly analysis. A Columbia Law Review study concluded of *Bercut* that:

> "under any reasonable interpretation of article III [of GATT], this decision is unacceptable". *Id.* at p. 550.

Similarly, Dam in *The GATT: Law and International Economic Organization* 130 (1970) states:

> "Does the system of assessment [*i.e.*, wine gallons] violate Article III [of GATT]? The U.S. Court of Customs and Patent Appeals held that it did not in *Bercut-Vandervoort & Co. v. United States*. The court relied on the formal equality between imported and domestic spirits under the terms of the statute. However elegant the opinion's demonstration of equality, the absurdity of the conclusion from an international trade perspective is revealed by the court's concession that the foreign distiller could avoid any competitive disadvantage

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"Note, *United States Participation in the General Agreement on Tariffs and Trade*, 61 Colum. L. Rev. 505, 549-551 (1961); *See* Wilcox, *supra*, at p. 505.

due to the tax assessment system by establishing bottling facilities in the United States. The underlying assumption of the General Agreement indeed, the argument for free trade in general is that local laws and regulations should not make the location of industry a factor in trade. To say that part of the foreign industry must be moved to the United States for the foreign product to have the same competitive position as the domestic product is to concede that the legislation in question distorts international trading patterns and serves 'to afford protection to domestic production.' On the purely technical level, the decision in *Bercut-Vandervoort* may be criticized on the ground that the court considered only the first sentence of paragraph 2 and therefore treated the question as simply one of equal treatment of 'like' products. But given its argument that imported bulk liquor is treated equally with domestic bulk liquor, the court acted strangely in not also considering whether, under the second sentence of paragraph 2 (incorporating by reference paragraph 1) and the interpretative note to paragraph 2, the taxation of imported bottled liquor did not serve to 'afford protection to domestic production' (paragraph 1) to 'a directly competitive or substitutable product which was not similarly taxed' (interpretative note to paragraph 2). The protection afforded the domestic product is the heart of the matter."

See also Kelly, *Nontariff Barriers*, appearing in Balassa, *Studies in Trade Liberalization* 265, 303-304 (1967) quoted in 14 *Digest of International Law* 814-815.

The truth of the matter is that the holding in *Bercut* was contrary to the position of the Executive Branch of the Government in seeking Congressional authority

in 1950 and 1951 for unqualified adherence to GATT on the part of the United States.[28] Legislation was introduced on behalf of the Administration in both years which would have made then-existing United States law conform with the GATT.[29] One of the items the Administration sought to correct was the wine gallon method of tax assessment because it regarded that method as contrary to the United States' commitments under GATT.[30] Administration witnesses and statements from the State Department, Treasury Department, and the Tariff Commission interpreted wine gallon as incompatible with GATT and no Administration witness expressed a contrary view.[31] These same agencies and several of the witnesses appearing before the Congressional committees participated on behalf of the United States in negotiating GATT. This construction by the Executive Branch of the Government is crucial evidence of the scope of GATT's national treatment provisions, but it was regrettably not before the court in *Bercut*. The reliability of that decision must be evaluated accordingly.

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[28] *See* Treasury Department Analysis of the Customs Simplification Act of 1950, H.R. 8304, 81st Cong., 2d Sess., contained in Hearings Before the Committee on Ways and Means, House of Representatives, 82d Cong., 1st Sess., on H.R. 1535 (hereinafter cited as 1951 House Simplification Hearings); 1951 House Simplification Hearings, at 92-212 (Remarks of, *inter alia*, John S. Graham, Assistant Secretary of Treasury and W. R. Johnson, Assistant to the Commissioner of Customs, on H.R. 1535).

[29] H.R. 8304, 81st Cong., 2d Sess.; H.R. 1535, 82d Cong., 1st Sess.

[30] H.R. 8304, *supra*, § 24(d); H.R. 1535, *supra*, § 24(d).

[31] *See* note 28, *supra*, and Testimony of Mr. Winthrop G. Brown, Director of Office of International Materials Policy, Department of State, 1951 House Simplification Hearings, *supra*, at pp. 609, 610, 613-614, 627-628, 650, 651.

There is a final irony about the decision in *Bercut*: The court could have arrived at exactly the same decision without the need for construing the national treatment provisions of GATT. The United States undertook the obligation of GATT subject to a Protocol executed on October 30, 1947.[32] This Protocol provided that the United States was bound by the national treatment provisions of GATT only "to the fullest extent not inconsistent with existing legislation". The wine gallon provision was concededly existing legislation,[33] and the Protocol exempting such legislation should have been dispositive in *Bercut*.

Although the ultimate decision in *Bercut* was correct (by virtue of the Protocol and not on the grounds adduced by the court), that case must be re-examined because its erroneous holding concerning the application of national treatment to the wine gallon tax scheme has been accorded the force of *stare decisis* by the customs courts. That case decided prematurely and

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[32] Protocol of Provisional Application, 61 Stat. (6) A2051, BISD Vol. IV, at 77:

> "1. The Governments of * * * and the United States of America, undertake * * * to apply provisionally on and after 1 January 1948:
>
> (a) Parts I and III of the General Agreement on Tariffs and Trade, and
>
> (b) Part II of that Agreement *to the fullest extent not inconsistent with existing legislation.*" (Emphasis added.)

Article III of the GATT relating to National Treatment on Internal Taxation and Regulation appears in Part II of the GATT and is thus subject to this Protocol.

[33] INT. REV. CODE OF 1939, § 2800, 52 Stat. 572 (now INT. REV. CODE OF 1954, § 5001(a)(1)).

erroneously an important issue of construction in a major and complex multilateral agreement. The GATT established an international organization to administer and carry out its provisions. Like an administrative agency in our domestic system, this organization must be free to evolve its own pattern of interpretations in its area of special competence; and these when formulated may provide a guide to the various domestic courts confronted with the same problem. By addressing the substantive issue of the scope of national treatment under GATT, rather than basing its decision in *Bercut* on the Protocol, the Court of Customs and Patent Appeals preempted this interpretative task of GATT. The decision below renews this error.

C. The Decision of the Court Below Is in Conflict With a Decision of the Ninth Circuit Court of Appeals Construing a Similar Provision of the IRC Applicable to Spirits Imported from the Virgin Islands

Since the Court of Customs and Patent Appeals has exclusive jurisdiction over appeals on protests of taxes levied on imported articles, a conflict of circuits involving one of its decisions cannot arise in the strict sense. Rule 19(2) of this Court recognizes this anomaly by providing that the "same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the * * * Court of Customs and Patent Appeals * * * *". In this case, there is as close an approximation to a direct conflict of circuits as is possible in the circumstances.

The Court of Appeals for the Ninth Circuit in *Parrott & Co. v. United States*, 156 F.2d 943 (9th Cir. 1946), construed the equivalent of the Irish

Treaty's national treatment clause in a federal statute that accorded imports from the Virgin Islands "a tax equal to the internal revenue tax imposed in the United States upon like articles of domestic manufacture".[34] The operative words of the statute were "a tax equal to" while those of the Irish Treaty are tax "treatment no less favorable than" that imposed on like domestic United States' products. In practical terms, the two formulations are equivalents —both a treaty provision and a federal statute are entitled to the same force as law. The Court of Appeals in *Parrott* held that bottled rum imported from the Virgin Islands under proof (e.g., 86 proof) was taxable on a proof gallon basis rather than on the wine gallon basis as the Government claimed. The national treatment provision in the Irish Treaty was given the opposite construction in the present case. The inconsistency constitutes a conflict in the federal judiciary within the spirit of Rule 19(1)(b) and (2) of the Court.

D. The Decision Below Is in Conflict With the Interpretation of the National Treatment Clause Advanced by the State Department as the Responsible Organ of the United States Government for Dealing With Foreign Governments, and With the Interpretation Maintained by the Major Trading Partners of the United States

The United States has been criticized in the GATT for the wine gallon method of tax assessment.[35] *See*, GATT Committee on Trade in Industrial Products,

[34] INT. REV. CODE OF 1939, § 3350, 40 Stat. 1142 (now INT. REV. CODE OF 1954, § 7652(b)(1)).

[35] As noted earlier, however, GATT proceedings cannot be used to enforce Article III against the United States' wine gallon legislation because in GATT the United States Government would argue that GATT could take no decision on wine gallon in view of the Protocol.

"Inventory of Non Tariff Barriers" ("Protection" by means other than tariffs), GATT Document COM. IND 6 Add. 5 (1968). Although this document is classified by GATT, Her Majesty's Government was authorized by the European Economic Community to inform the court below that the report notes that the Community has protested the United States' excise tax system for spirits imported in bottles as contrary to Article III of GATT.[36] The Government of Canada has likewise granted permission to advise the Court of Customs and Patent Appeals that it had raised the same issue in GATT. Her Majesty's Government has also pressed its objection in that forum. The GATT document makes it clear that most of the major trading nations in the world are in agreement that the United States' wine gallon tax on bottles of imported distilled spirits affords protection to domestic production which in the absence of the Protocol would be prohibited by Article III.

Similarly, the Government of Ireland does not agree with the construction that the United States is placing on the Irish Treaty in this case. The Government of Ireland squarely challenged the correctness of the position of the United States in the Customs Court below.[37] It has filed a similar note with the Department of State for the benefit of this Court.[38]

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[36] An examination of this portion of the document has been authorized by the Community and Her Majesty's Government.

[37] Full text of the Note and Memorandum submitted by the Irish Ambassador filed with the Customs Court below. Copies appear in *Memorandum for the United States* filed with this Court in this case by the Solicitor General.

[38] *See* note 37, *supra*.

Finally, the Department of State itself is on record as to the discriminatory nature of the wine gallon basis for tax assessment. An exchange of correspondence with the British Embassy in Washington in October 1954 on the subject of the wine gallon tax stated:

> "The Department shares your views that the effect of this tax is to discriminate against imported distilled spirits."[39]

This remains the position of the Department of State in its dealings with foreign governments. During a GATT Working Party meeting in April 1970, representations were made that the United States' wine gallon tax was discriminatory under GATT. The United States' representative at this meeting acknowledged that the tax had a "non tariff barrier" effect that discriminated against bottled imports of whisky.[40] He, nevertheless, maintained that it was exempt from the Article III prohibition by virtue of the Protocol.[41]

Stated quite simply, the United States in its dealings with foreign governments does not claim that the

[39] Letter from Samuel Waugh, Assistant Secretary for Economic Affairs, Department of State, to Charles Empson, Commercial Minister, British Embassy, 12 Oct. 1954. Full text of exchange of letters appended to British Note and Memorandum of February 20, 1968, is filed with the Customs Court below. Copies appear in Appendix B to Her Majesty's Government amicus brief filed with the Court of Customs and Patent Appeals.

[40] GATT Working Party on Border Tax Adjustments—Draft Report Spec (70) 31/Rev. 1, 28 April 1970, at 80. This report is classified by GATT but Her Majesty's Government has advised counsel that it does not consider that formal GATT clearance is necessary for this reference to such document. The full text thereof can be made available to the Court by the State Department.

[41] *See* pp. 17, 18, *supra*.

wine gallon method of tax assessment conforms to national treatment standards. How can one reconcile this position of the United States' Department of State with that of its Court of Customs and Patent Appeals?

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

ANSEL F. LUNFORD
ABRAM CHAYES

Of Counsel:

MORGAN, LEWIS & BOCKIUS

Dated: August 21, 1970

APPENDIX A

Post 1947 Treaties of Commerce That Contain National Treatment Clauses

Country	Treaty	Effective Date	TIAS *	UST or STAT	National Treatment Article
Belgium	Friendship, Establishment & Navigation	1963	5432	14 UST 1284	9 †
China	Friendship, Commerce & Navigation	1948	1871	63 STAT 1299	X † XVIII **
Denmark	Friendship, Commerce & Navigation	1961	4797	12 UST 908	XI † XVI **
Ethiopia	Amity & Economic Relations	1953	2864	4 UST 2134	X(1) †
France	Convention of Establishment	1960	4625	11 UST 2398	IX †
Germany	Friendship, Commerce & Navigation	1954	3593	7 UST 1839	XI † XVI **
Greece	Friendship, Commerce & Navigation	1954	3057	5 UST 1829	16 † 19 **
Iran	Amity—Economic Relations & Consular Rights	1955	3853	8 UST 899	VI †
Ireland	Friendship, Commerce & Navigation	1950	2155	1 UST 785	IX † XVI **
Israel	Friendship, Commerce & Navigation	1954	2948	5 UST 550	XI † XVI **
Italy	Friendship, Commerce & Navigation	1949	1965	62 STAT 2255	IX † XVI **

* See p. 2a for footnote.

** See p. 2a for footnote.

† See p. 2a for footnote.